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In The

Supreme Court of the United States

October Term, 1993

JEAN A. McINTOSH, Individually and as Conservator for KRISTIN K. McINTOSH, A Protected Person,

Petitioner,

vs.

PACIFIC HOLDING COMPANY and THE PACIFIC HOLDING COMPANY EMPLOYEE WELFARE BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

SHAWN D. RENNER
CLINE, WILLIAMS, WRIGHT, JOHNSON & OLDFATHER
1900 FirsTier Bank Building
Lincoln, Nebraska 68508
Telephone: (402) 474-6900
Counsel of Record for Respondents Pacific Holding Company and Pacific Holding Company Employee Welfare Plan

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals was correct in determining that The Pacific Holding Company Employee Welfare Benefit Plan, which is regulated by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Sections 1101-1461, was entitled to reimbursement of medical benefits paid to a covered person by the plan from settlement proceeds recovered on behalf of the covered person from third parties when such reimbursement was specifically required by the plan.

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STATEMENT OF THE CASE

Petitioner Jean A. McIntosh and her minor daughter, Kristin, were "Covered Persons" under The Pacific Holding Company Employee Welfare Benefit Plan (the "Plan"), a self-funded, qualified, benefit plan under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101-1461, and were therefore eligible for health benefits. Kristin was injured in a car accident and the Plan has paid for her substantial medical expenses, which exceeded $434,000 as of January, 1991. By virtue of a settlement, $250,500 was recovered from insurers of the owner of the vehicle in which Kristin was a passenger and from the driver of the vehicle which caused the accident. The Plan claimed that it was entitled to these funds pursuant to either of the separate and distinct reimbursement and subrogation provisions contained in the Plan. Jean McIntosh contended that the settlement proceeds were paid entirely in satisfaction of Kristin's non-medical damages and therefore were not subject to the reimbursement or subrogation provisions of the Plan.

Jean McIntosh, individually and as Kristin's conservator, brought suit in the United States District Court for the District of Nebraska seeking a declaration that the Plan had no reimbursement or subrogation rights to the settlement proceeds, and that Jean was entitled to the proceeds as Kristin's conservator. The district court granted McIntosh's motion for summary judgment and denied Respondents' cross motion for summary judgment. On appeal, the Eighth Circuit Court of Appeals reversed the district court's decision and determined that based on the plain language of the Plan, the Plan had a

right to be reimbursed from the proceeds of the settlement. The court specifically held that the Plan provided for a right of reimbursement distinct from any subrogation right, a point raised before but not decided by the district court. *McIntosh v. Pacific Holding Company*, 992 F.2d 882, 884-85 (8th Cir. 1993). The Court of Appeals found it unnecessary to determine whether the agreement settling the personal injury claims had any effect on which party was entitled to the settlement proceeds. The case was remanded with directions to enter judgment in favor of the Respondents.

ARGUMENT

1. IN REQUIRING REIMBURSEMENT OF THE EMPLOYEE BENEFIT PLAN, THE PLAN ADMINISTRATOR ACTED CONSISTENTLY WITH THE CLEAR LANGUAGE OF THE PLAN.

(a) The Circuit Courts of Appeals Have Consistently Looked to the Plain Language of ERISA-Regulated Benefit Plans to Determine if the Plans are Entitled to Reimbursement or Subrogation From Plan Beneficiaries and Have Only Limited Recovery by a Plan When the Plan Itself Limited Such Recovery.

As determined by the Eighth Circuit Court of Appeals, the language of the Plan provides that the Plan is entitled to reimbursement from settlements received by Plan beneficiaries. 992 F.2d at 885. The Plan specifically provides that its administrator has discretionary authority to interpret the provisions of the Plan. Because the language of the Plan specifically requires reimbursement

by the Petitioner of the money she received in settlement, the Plan administrator did not abuse its discretion in requiring the Petitioner to reimburse the Plan. The decision by Eighth Circuit Court of Appeals in this case is consistent with prior decisions involving ERISA-regulated plans, which emphasize the importance of relying upon the clear language of such plans. *See, e.g., Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101 (1989); *Meadows By and Through Meadows v. Cagle's, Inc.,* 954 F.2d 686 (11th Cir. 1992) (plan language is controlling when it addresses substantive rights of parties); *Jacobs v. Pickands Mather Co.,* 933 F.2d 652 (8th Cir. 1991).

The Respondents urge this Court to deny the Petition for Writ of Certiorari because the Eighth Circuit Court of Appeals determined the controlling issue to be one of plan interpretation, which does not warrant this Court's attention.

(b) The Plan's Administrator Acted Within Its Discretion in Determining that the Plan's Reimbursement Provision Requires the Plan to Be Reimbursed From the Settlement Obtained by the Beneficiary.

Under *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), a deferential standard of review of plan benefit decisions is appropriate if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. The Plan provides precisely such discretionary authority, as follows:

Powers and Duties.

> The Administrator shall administer the Plan in accordance with its terms. . . . shall interpret the Plan and determine all questions arising in the administration, interpretation, and application of the Plan. . . . In the exercise of its discretion, the Administrator shall not discriminate either for or against any Covered Employee, irrespective of such Covered ~~Employee's~~ level of compensation or position in the Company.

(App. to Petition at 21). The administrator's interpretation of the Plan's reimbursement provision is clearly permissible since the interpretation is wholly consistent with the plan language of the Plan. In its decision, the Eighth Circuit agreed that the administrator's interpretation of the Plan's reimbursement clause was the most reasonable one and the only one which would not lead to haphazard results. 992 F.2d at 885.

2. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING LIMITATIONS ON AN ERISA PLAN'S REIMBURSEMENT OR SUBROGATION RIGHTS.

Petitioner asks this Court to hear this case based, in part, on the claim that there is a split among the Circuit Courts of Appeal with regard to whether ERISA limits the types of reimbursement or subrogation which an ERISA-regulated plan may obtain when plan beneficiaries enter into settlements with third parties. In claiming that a conflict exists among the Fourth, Fifth, Seventh and Eighth Circuits, Petitioner cites the Eighth Circuit's decision in this case and three other cases: *Liberty Corp. v.*

NCNB Nat. Bank of South Carolina, 984 F.2d 1383 (4th Cir. 1993); *Jones v. SONAT, Inc. Emp. Ben. Plan Admin. Com.*, 997 F.2d 113 (5th Cir. 1993); and *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3150 (Oct. 12, 1993).

Petitioner's perception of a conflict is incorrect. In each of the four cited cases, the ability of the benefit plan to require reimbursement or subrogation from third parties was based upon the language contained in the particular plan. In none of the cases did the reviewing court find that either ERISA statutory or common law limited the type or nature of reimbursement or subrogation to which the plan in question was entitled. In the two cases in which a plan was denied subrogation or setoff (*Liberty Corp.* and *Jones*), the denial was based on the fact that the plans themselves limited the circumstances under which setoff or subrogation would be allowed. The administrators of the plans attempted to obtain setoff or subrogation in situations which were not contemplated by the provisions of the plans.

In this case, the Eighth Circuit did not construe the provisions of, or discuss any public policy issues in connection with, ERISA. What was relevant to the Court of Appeals was that the language of the Plan clearly permitted reimbursement from the settlement received by the beneficiary. The Plan states:

> It is hereby agreed that in the event a Covered Person receives *any benefits* arising out of injury or illness for which the Covered Person has, may have, or asserts *any claim or rights to recovery* against a third party or parties, then any payment or payments by the Plan for such benefits shall be made on the condition and with the

> agreement and understanding that the Plan will be reimbursed therefor by the Covered Person to the extent of, but not exceeding the amount or amounts received by the Covered Person from such third party or parties by way of settlement . . .

(App. to Petition at 38) (emphasis added).

The employee benefit plan in *Liberty Corp.* was significantly different from the Plan in this case. The *Liberty Corp.* plan subrogation provision provided:

> Payment made for charges must be returned to the Plan if . . . benefits are paid to or on behalf of a Covered Individual who has . . . Medical or Dental charges . . . for which a third party is acknowledgedly liable or found to be legally liable by a Court of competent jurisdiction.

984 F.2d at 1385, n.1. The court observed that with that rather limited language, the beneficiary "subrogated to Liberty only his right to recover from third parties compensation for his medical expenses." *Liberty Corp.*, 984 F.2d at 1388 (emphasis added). The Fourth Circuit held that the beneficiary did not have to reimburse the plan because the amount which the plan sought to recover "was indisputably only for wrongful death" and not for medical expenses; by the plan's own terms, such a payment did not trigger the reimbursement obligation. The court did review whether state laws in certain cases may be incorporated into ERISA. However, such review was undertaken solely for the purpose of determining whether the benefit for which reimbursement was sought was a medical benefit or not. The Fourth Circuit did not make any decision, or even any reference to, whether

ERISA-regulated plans are limited solely to reimbursement or subrogation for medical expenses even if the plan specifically permits recovery from payments made for non-medical expenses.

The Petitioner contends that the "facts relevant to the 'reimbursement/subrogation' issue in *Liberty Corp.* are indistinguishable from the facts relevant to the 'reimbursement/subrogation' issue in this case." Petition for Writ of Certiorari at 19. Petitioner's argument ignores the distinction between the Plan in the instant case, which provides a contractual right to receive reimbursement from any settlement arising out of the injury received by the beneficiary, and Liberty's plan, which was interpreted as providing no subrogation right for non-medical settlement proceeds. Hence, the decisions do not conflict.

In *Jones*, the Fifth Circuit denied a setoff claim based on a provision of the employee benefit plan which provided that "any plan benefits to which Jones [the beneficiary] was entitled would be further reduced by the full amount of any 'payment for disability' that he received under the [Louisiana Workers' Compensation Act] or other worker's compensation scheme 'or any legislation of similar purpose, which payment arises as a result of a disability.' " *Jones*, 997 F.2d at 114. Jones was awarded a settlement under the Jones Act that specifically excluded any claims arising out of his employee benefit plan. The benefit plan argued that the settlement was under legislation similar to workers' compensation. The Fifth Circuit determined that the plan had no right to setoff because the "SONAT [Plan] Committee unfairly characterized Jones's settlement as a worker's compensation settlement or one 'pursuant to . . . any other legislation or similar

purpose' which would be covered by Section 3.04." *Id.* In other words, the court simply interpreted the plan provisions differently than the administrator. In making its decision, the Fifth Circuit did not determine whether ERISA or federal common law affected the plan's right to receive the proceeds of the settlement, but based its reasoning solely on the language of the plan. Again, that is precisely what was done in the case at bar.

The benefit plan in *Cutting* permitted the plan to be "subrogated to all claims, demands, actions and rights of recovery of the individual against any third party or any insurer, including Workers' Compensation, to the extent of any and all payments made or to be made hereunder by the Plan." *Cutting*, 993 F.2d at 1295. The Seventh Circuit rejected the beneficiary's claim that she did not have to reimburse the plan unless she fully recovered for her various losses (a claim first made by the Petitioner in this Court). The court based its decision on the language of the plan and held that the plan had a right to subrogation.

In each of the four cases cited by the Petitioner, the Circuit Court based its conclusion on the language of the benefit plan under review. In that respect, the decisions are entirely consistent. Because the cases involved only the interpretations of the various plans, the Petitioner is incorrect in asserting that a conflict of law exists among the circuits.

3. NO SIGNIFICANT ISSUE EXISTS, UNRESOLVED BY THIS COURT, CONCERNING THE LIMITS ON AN ERISA PLAN'S ABILITY TO IMPOSE CONDITIONS UPON A BENEFICIARY FOR REIMBURSEMENT.

The Petitioner has asked this Court to create two public policies. They are:

1. The enforcement of reimbursement or subrogation clauses in ERISA-regulated plans should be limited, as a matter of federal common law, to recovering only from certain types of settlements, regardless of the plan language.

2. No ERISA-regulated plan should have a right to reimbursement or subrogation until the beneficiary has received "full recovery."

In asking this Court to adopt these new policies, the Petitioner does not cite any provisions of ERISA or any applicable case law for support. In *Bruch*, this Court required the courts to look to the terms of the plans themselves to determine the respective rights of the beneficiaries and the plans. *Id.* at 115. That is what the Eighth Circuit did in this case. Furthermore, that was done in each of the cases cited by Petitioner.

Petitioner's argument regarding "full recovery" has no applicability here, and raises no significant issue, for two reasons. First, this argument was not made by Petitioner in the district court, and was not presented to the Court of Appeals until Petitioner sought rehearing; it thus cannot properly be raised here. Second, *Shelter Ins. Co. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), which Petitioner argues establishes a "full recovery" limitation

that must be imposed on ERISA plan subrogation or reimbursement rights as a matter of federal common law, specifically recognizes that the supposed "full recovery" rule does not apply where the contract in question "provides for subrogation on payment of less than the full amount of a debt or loss. . . . " *Id.* at 117-118, 498 N.W.2d at 78-79. *See Cutting, supra,* 993 F.2d at 1296-97 (collecting cases).

There simply is no support in the record for the argument that the result in this case is so unconscionable or egregious as to violate some unannounced federal public policy. Moreover, the Petitioner suggests no guidelines for this Court to use in determining the limits on the nature of reimbursement or subrogation to which a plan is entitled. Instead, the Petitioner asks this Court to disregard its past holdings and to impose on ERISA-regulated plans arbitrary new rights. The long-term effect of adopting the Petitioner's position would be to make ERISA-regulated plans more costly, which would eventually result in the reduction of other benefits provided to employees. *See Cutting, supra,* 993 F.2d at 1297-98.

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful and competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates,* 508 U.S. ___, ___, 124 L.Ed.2d 161, 174 (1993). The decision of the Court of Appeals is wholly consistent with the statute, as construed by this Court. The Court should reject Petitioner's invitation to make from the whole cloth of federal common law a garment not woven by Congress in the fabric of the statute.

CONCLUSION

For the foregoing reasons, Respondents Pacific Holding Company and The Pacific Holding Company Employee Welfare Benefit Plan pray that a Writ of Certiorari not be issued from this Honorable Court to review the Judgment of the United States Court of Appeals for the Eighth Circuit in *McIntosh v. Pacific Holding Company et al.*, 992 F.2d 882 (8th Cir. 1993).

Respectfully submitted,

Pacific Holding Company and
Pacific Holding Company Employee
Welfare Plan, Respondents

By: SHAWN D. RENNER
CLINE, WILLIAMS, WRIGHT
JOHNSON & OLDFATHER
Attorneys at Law
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900
Counsel of Record
for Respondents
Pacific Holding Company and
The Pacific Holding Company
Employee Welfare Benefit Plan